OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 3, 2003

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2003-3780

Dear Ms. Sims:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182124.

The City of Lubbock (the "city") received a request for information relating to certain financial information and e-mail communications of a named individual. You state that you have released some responsive material to the requestor. However, you claim that portions of the remaining responsive information contained within Attachments B through D, and in Attachments H and I, are excepted from disclosure under sections 552.101, 552.107, 552.109, 552.117, 552.133 and 552.137 of the Government Code. We have also received comments from the West Texas Municipal Power Agency ("WTMPA"), as well as the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit comments explaining why information should or should not be released). We have reviewed the submitted information and have considered the issues raised by the city and the WTMPA.

You argue section 552.107 of the Government Code with respect to documents contained in Attachment B. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of

professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Therefore, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning one that was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). We determine the applicability of section 552.107(1) on a case-by-case basis.

You explain "the requested documents include opinions and communication to and from the City Attorney's Office." Based on your argument and a review of Exhibit B, we agree most of the information constitutes communications made for the purpose of facilitating legal services. However, we note you have failed to identify the parties to the communications in the submitted information. *See* Open Records Decision No. 676 at 8 (2002) (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in Rule 503). Nevertheless, after reviewing the submitted information, we have ascertained the identities of some of the parties to the communications. Accordingly, with the exception of the information we have marked, the city may withhold the information in Exhibit B under section 552.107(1) of the Government Code.

WTMPA also argues that a portion of the information in Attachment F is excepted under section 552.107. The WTMPA argues that this information in Attachment F consists of communications concerning professional legal services to the WTPMA, between privileged

WTMPA personnel and their lawyers. We agree with the WTMPA's assertions and find that the marked communications in Attachment F must be withheld under section 552.107.

You argue section 552.137 of the Government Code with respect to documents contained in Attachment C.[1] The submitted information contains e-mail addresses obtained from both the general public and government officials. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

> (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
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> (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. We note that you have highlighted both private and public e-mail addresses. The plain language of section 552.137 withholds only e-mails of members of the public. Section 552.137 does not apply to a government employee's work e-mail address, the general e-mail address of a business, nor to a web site or web page. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The city must, therefore, withhold e-mail addresses of members of the public contained in the submitted information, a representative sample of which we have marked, under section 552.137.[2]

You next argue section 552.133 of the Government Code with respect to documents contained in Attachment D. Section 552.133 of the Government Code excepts from public disclosure information held by a public power utility that is related to a competitive matter. *See* Gov't Code § 552.133(b). Section 552.133 defines "competitive matter" as a matter that the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity. *Id.* § 552.133(a)(3). The governing body also must determine, in like manner, that the release of the information would give an advantage to competitors or prospective competitors. *Id.* Section 552.133(a)(3) lists thirteen categories of information that may not be deemed to be competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the information at issue only if, based on the information provided, the attorney general determines that the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a

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[1] We note that section 552.136 pertaining to e-mails is identical to section 552.137.

[2] We note that some of the e-mail addresses have domain names of utility providers. Only those e-mail addresses from publically held companies may be withheld under section 552.137 of the Government Code.

competitive matter or that the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c).

The city has submitted a copy of a resolution delineating categories of information that have been determined by the city to be competitive matters for purposes of section 552.133. The city asserts that the submitted information comes within the scope of the resolution and therefore is protected from public disclosure under section 552.133. We find, however, that some of the submitted information consists of "aggregate information reflecting receipts or expenditures of funds of the public power utility, of the type that would be included in audited financial statements[.]" Gov't Code § 552.133(a)(3)(E). We have marked that information. The marked information may not be deemed to be related to a competitive matter, and thus may not be withheld from disclosure, under section 552.133. *See id.* § 552.133(a), (c). As the city raises no other exception to the disclosure of the marked information, it must be released. Otherwise, we find that the remaining submitted information in Attachment D is not clearly among the types of information that section 552.133 expressly excludes from the definition of competitive matter. Furthermore, we have no evidence that either the city failed to act in good faith in adopting its resolution under section 552.133. Therefore, based on the city's representations and their resolution, we conclude that the remaining information in Attachment D is excepted from disclosure under section 552.133 of the Government Code.

We also note that the WTMPA seeks to withhold certain information in Attachment F under section 552.133. We agree with the WTMPA that the information it has marked in Attachment F is protected from disclosure by section 552.133.[3]

You next argue section 552.101 and 552.109 of the Government Code with respect to documents contained in Attachment H. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section also encompasses the doctrine of common-law privacy. Information is excepted from required public disclosure by a common-law right of privacy if the information (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied,* 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Because "the right of privacy is purely

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[3] We note that in Open Records Letter Ruling No. 2003-0224 (2003), this office, based upon representations made by WTMPA and its submitted resolution, ruled that certain WTMPA information was excepted under section 552.133. We have considered this information in arriving at our conclusion in the instant ruling.

personal," that right "terminates upon the death of the person whose privacy is invaded." *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.–Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded") (quoting Restatement of Torts 2d); *See* Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death."); Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death").

You also assert that these records are excepted from disclosure under section 552.109. Section 552.109 of the Government Code excepts from required public disclosure private correspondence and communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy. This office has ruled that the test to be applied to information claimed to be protected under section 552.109 is the same test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy. Open Records Decision No. 506 at 3 (1988). Accordingly, we will address your claims under sections 552.101 and 552.109 together.

Based on our review of the information in Attachment H, we conclude that this information is not protected by common-law privacy under sections 552.101 or 552.109, and therefore, it must be released to the requestor, except as noted below. We further note that none of this information in Attachment F is confidential under common-law privacy.

You raise section 552.117 of the Government Code with respect to documents contained in Attachment I. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those officials or employees who timely elected to keep their personal information confidential, the city must withhold the official's or employees' home addresses and telephone numbers. In your brief, you state that none of the individuals named in Attachment I have elected to permit disclosure of the information, but you do not indicate whether such an election was made prior to the request for information. Therefore, the city may withhold this information we have marked under section 552.117(1) only for those current or former officials or employees who made a timely election to keep such information confidential. We also note that the information within Attachment H is excepted under section 552.117(1) if the named council member has made a timely election under section 552.024.

Finally, we address the remaining arguments submitted to this office by WTMPA for withholding a portion of the information you have submitted as Attachment F. WTMPA claims that a portion of the requested information in Attachment F is excepted from disclosure under sections 552.106, 552.110, 552.111, and 552.136 of the Government Code.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath,* 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. We note that section 552.111 is applicable to communications that involve a governmental body's consultants. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant). Section 552.111 is not applicable, however, to communications with a party with which the governmental body has no privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990). Upon review of the information in Attachment F, we agree that a portion of the submitted communications contain advice, recommendations, opinions, and other material reflecting the policymaking of the WTMPA. We determine that the city must withhold this information, which we have marked, pursuant to section 552.111 of the Government Code.[4] We note, however, that a portion of the information the WTMPA seeks to withhold under section 552.111 is purely factual. This information is not excepted from disclosure under section 552.111. For this information, we will address WTMPA's argument under section 552.106.

Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Section 552.106 ordinarily applies only to persons with a responsibility to prepare

[4] As we are able to make this determination, we need not address WTMPA's argument under section 552.106 for this information.

information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* As the information not already excepted by section 552.111 is factual, we similarly conclude that section 552.106 does not protect this information.

WTPMA also argues that a portion of the information in Attachment F is excepted as a trade secret under section 552.110. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).[5] This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). After reviewing the WTMPA's arguments and the information at issue, we conclude that the WTMPA has not established a prima facie case that the information is a trade secret. Therefore, you may not withhold any information in Attachment F under section 552.110(a).

Finally, the WTMPA raises section 552.136 with respect to certain PIN numbers for conference calls within Attachment F. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. In this instance, we find section 552.136 inapplicable to the information at issue. The WTMPA must, therefore, release the PIN numbers under section 552.136.

In summary, with the exception of the information we have marked, the city may withhold the information in Exhibit B under section 552.107(1) of the Government Code. The city must withhold e-mail addresses of members of the public contained within all of the Attachments under section 552.137. With the exception of the information we have marked that is not related to a competitive matter and for which the city raises no other exception to the disclosure, the information in Attachment D may be withheld under section 552.133. The information which we have marked within Attachment I, and all of the information in Attachment H, must be withheld under section 552.117 only for those current or former officials or employees who made a timely election under section 552.024. Concerning the arguments raised by the WTMPA, the information we have marked in Attachment F may be

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[5] The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

> (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

withheld under sections 552.107, 552.111, and 552.133. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Robert F. Maier
Assistant Attorney General
Open Records Division

RFM/seg

Ref: ID# 182124

Enc. Submitted documents

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